UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ELLA M. SAPP, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBER SF-0353-96-0054-B-2 DATE: MAY 26 1999

Clete B. Weiser, Esquire, Marshall, Texas, for the appellant.

Mike Thomas, City of Industry, California, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant and Norman Wright, a third-party claimant, petition for review of a remand initial decision that affirmed the agency's refusal to restore the appellant after a compensable injury and granted Mr. Wright's request for official time and mileage but denied his request for fees and expenses related to his representation of the appellant. For the reasons discussed below, we GRANT the appellant's petition, VACATE the remand initial decision with respect to the issues of restoration and disability discrimination, and REMAND the appeal for further proceedings consistent with this Opinion and Order. We DENY Mr. Wright's petition for failure to meet the criteria for review under 5 C.F.R. § 1201.115, but REOPEN the appeal on the Board's own motion under 5 C.F.R. § 1201.118, and AFFIRM AS MODIFIED herein the remand initial decision with respect to his claims.

BACKGROUND

¶2 This appeal was previously before the Board. *Sapp v. U.S. Postal Service*, 73 M.S.P.R. 189 (1997). On prior appeal, the Board noted that the agency had an obligation to "make every effort to restore" the appellant as a "partially recovered" individual under 5 C.F.R. § 353.304, and that this obligation included searching throughout the "local commuting area" for vacant positions to which she could be restored. *Id.* at 192-93. Regarding the administrative judge's (AJ's)

finding that the agency's search was properly limited to the Santa Ana District, the Board found that it was not supported by specific findings, or any record evidence, on whether the Santa Ana District encompassed the entire local commuting area. *Id.* at 193-94. The Board therefore remanded the appeal "for a determination regarding whether the scope of the agency's search for vacant positions ... was adequate," with the following instructions:

> If [the scope of the agency's search] was [adequate, i.e., if the local commuting area was limited to the Santa Ana District], the administrative judge shall issue an initial decision setting forth that conclusion and incorporating his previous findings on the remaining issues raised by the appeal; if not, he shall issue an initial decision ordering the agency to conduct an adequate search within the local commuting area and to consider the appellant for restoration based on the results of that search.

Id. at 195. The Board stated that the AJ may consider on remand whether Donald Barnett and Norman Wright were entitled to official time related to their participation at the hearing. *Id.* at 196-97.

¶3 On remand, the AJ dismissed the appeal without prejudice because the appellant's new attorney requested discovery of documents pertaining to the scope of the local commuting area, and it did not appear feasible to resolve the discovery issues and then conduct a hearing within the Board's normal 120-day time limit. Remand File, Tab 8. Regarding the claims by Messrs. Barnett and Wright, the AJ found that only Mr. Wright timely responded to the AJ's order to file a claim and that, therefore, only Mr. Wright may pursue the claim upon the refiling of the appeal. *Id.*[1]

¶4 The appellant timely refiled the appeal. Refiled Remand File (RRF), Tab 1. The AJ thereafter left the Board's employ, and the appeal was reassigned to

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[1] This initial decision became final on May 19, 1997, when neither party filed a petition for review.

another AJ. RRF, Tab 4. Without holding a hearing, the newly assigned AJ issued the remand initial decision finding as follows:

> Upon remand, the agency agreed to conduct a further search within the Los Angeles, Long Beach and Van Nuys Districts, as well. Those districts, in conjunction with the Santa Ana District already considered, cover an area from Santa Barbara to the north, to San Clemente to the south, and from the San Gabriel and San Bernardino Mountains to the east, to the Pacific Ocean to the west. Thus, the area reaches at least 50 miles, and considerably more in some directions, from the appellant's pre-separation duty station, and meets any reasonably arguable interpretation of local commuting area.
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> The appellant's counsel did not contend that such an expanded area did not constitute a reasonable local commuting area. Further, during a telephone status call of October 6, 1997, the parties were given until October 27, 1997 to submit any additional evidence or argument for consideration. The appellant made no such submissions. Accordingly, I find that the agency's search throughout the districts listed above constituted a search in an "appropriate local commuting area."

Remand Initial Decision (RID) at 3-4, RRF, Tab 13. The AJ then incorporated the findings in the original initial decision regarding the suitability of certain positions, and made some additional findings, to conclude that the agency properly denied the appellant restoration and that she failed to establish her claim of disability discrimination. *Id.* at 4-6; *see* Initial Appeal File, Tab 19 at 2-5. Regarding the claim for official time by Mr. Wright, the AJ found that he was entitled to official time and reimbursement for mileage as claimed, but was not entitled to fees or expenses for acting as the appellant's union representative. RID at 7.

¶5 On petition for review, the appellant challenges the AJ's finding that the agency conducted an appropriate search of the local commuting area. Remand Petition for Review File (RPRF), Tab 1. Mr. Wright challenges the AJ’s findings

regarding his claims for official time and fees. RPRF, Tab 3; *see* RPRF, Tab 4. The agency has not responded to the petitions.

ANALYSIS

Restoration Rights

¶6 The AJ was instructed to determine on remand the scope of the local commuting area. *Sapp*, 73 M.S.P.R. at 194, 195. The AJ did not make such a determination. Instead, the AJ noted that the agency had "agreed to conduct a further search within the Los Angeles, Long Beach and Van Nuys Districts," in addition to the Santa Ana District within which it previously conducted a search, and that these combined districts extended "at least 50 miles, and considerably more in some directions, from the appellant's pre-separation duty station." RID at 3-4. He stated that these districts thus met "any reasonably arguable interpretation of local commuting area." RID at 4. He thus appeared to find that these combined districts were more than adequate to constitute the local commuting area. He did not make a specific finding, however, on which components of the agency were located within the local commuting area.

¶7 Assuming the parties stipulated that these four districts constituted the local commuting area, such a stipulation would be sufficient to resolve the issue of the local commuting area. 5 C.F.R. § 1201.63. However, the AJ did not find, and we cannot determine from the present record, whether the agency's "agreement" to conduct a search throughout these districts should be construed as a stipulation on the scope of the local commuting area. Nor is there any record evidence on the geographic location of these districts and their components. The AJ scheduled a status conference to discuss "discovery issues as well as the issues to be adjudicated in the remand initial decision," RRF, Tab 8, and the conference was apparently held on October 6, 1997, RID at 4. No tape/transcript or summary of the status conference is in the record, however, and nothing in the record describes what transpired during the status conference. Hence, we cannot

determine whether and how the AJ defined the issues to be resolved and what stipulations, if any, the parties reached concerning the relevant issues in this appeal. *See Dorsett v. U.S. Postal Service*, 75 M.S.P.R. 345, 348 (1997). Consequently, we cannot determine the circumstances under which the agency "agreed" to conduct a wider search of these four districts and cannot determine whether, under the circumstances, the agreement should be deemed a stipulation on the scope of the local commuting area.

¶8 Moreover, assuming the AJ intended to find that the local commuting area consisted of all four districts, the Board's remand order instructed him to issue an initial decision, in that situation, ordering the agency to conduct an adequate search within the local commuting area and to consider the appellant for restoration based on the results of that search. That is, the Board's remand order instructed the AJ to issue an initial decision reversing the agency's denial of restoration and granting the appellant relief. 73 M.S.P.R. at 194, 195 (citing *Farrell v. Department of Justice*, 50 M.S.P.R. 504, 513 (1991), *overruled on other grounds by Leach v. Department of Commerce*, 61 M.S.P.R. 8 (1994)). The remand initial decision did not comply with these instructions.

¶9 Setting aside the AJ's failure to follow the instructions in the Board's remand order, we find that the remand initial decision does not otherwise adequately resolve the restoration issue. The AJ found that the agency's wider search disclosed no available, suitable positions to which the appellant could be restored. RID at 4, 6. The only record evidence on which the AJ relied to support this finding is a computer printout of a list of PS-04 positions in the districts of Los Angeles, Long Beach, Van Nuys, and Santa Ana.[2] The printout was dated September 30 and October 1, 1997.

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[2] The AJ cited RRF, Tab 12. RID at 6. Tab 12 consists of Mr. Wright's claim for official time, however, and it appears that the AJ intended to cite to Tab 11 which consists of the computer printout.

¶10 The appellant contends on review that the list includes only encumbered positions, not vacant positions, and does not include any positions below the PS-04 level. The record does not reveal whether the list includes vacant positions, and the list, on its face, does not include any positions below the PS-04 level. The appellant further contends on review that she pointed out these deficiencies during the status conference but that the AJ rejected her request that the agency be ordered to produce additional evidence. An appellant may challenge on review an AJ's rulings only if she preserved them for review by timely objecting. *See Tarpley v. U.S. Postal Service*, 37 M.S.P.R. 579, 581 (1988). Because the AJ did not document what transpired during the status conference, as noted above, we cannot determine whether the appellant preserved these objections for review.

¶11 In any event, we find, for the following reasons, that the record is insufficient to support the AJ's determination that the agency satisfied its obligation to search for available, suitable positions. The list does not show whether it includes positions that were available retroactive to September 21, 1994, when the appellant requested restoration. *See Farrell*, 50 M.S.P.R. at 513 (upon reversing the agency's denial of restoration, the Board ordered the agency to consider the appellant for restoration within the local commuting area, retroactive to his request for restoration). In addition, the list does not include positions below the PS-04 level. The agency's regulations provide that, in restoring a partially recovered former employee, the "employee may be returned to any position for which he or she is qualified, including a lower grade position than that which the employee held when compensation began." RRF, Tab 1, section 546.141.b. Therefore, unless the appellant expressed an unwillingness to consider positions below PS-04, the agency was obligated to search for lower-graded positions. *See Campbell v. U.S. Postal Service*, 75 M.S.P.R. 273, 279 (1997) (an agency is required to act in accordance with the procedures it adopts for itself, and the

Board will enforce employee rights derived from such rules, regulations, and collective bargaining agreements); *see generally Moore v. U.S. Postal Service*, 76 M.S.P.R. 373, 377-78 (1997) (involving the restoration of a partially recovered employee to a lower-graded position). Neither the list nor any other record evidence shows that the agency conducted an appropriate search meeting these requirements.

¶12 Because the AJ thus failed to make specific findings on the scope of the local commuting area, and because the record is inadequate for us to resolve the issue on review, we must remand the appeal for further development of the record and a readjudication of this issue.

Disability Discrimination

¶13 In remanding this appeal, the Board noted that "adjudication on remand [regarding the scope of the local commuting area] may result in a broader search for available vacancies and thus might possibly result in the appellant's restoration to duty depending on the results of that search." *Sapp*, 73 M.S.P.R. at 194. The Board further noted that, "[i]n that event, the Board would lack jurisdiction over the underlying matter" and over related issues such as discrimination. *Id.* The Board explained that "[a] partially recovered employee may appeal to the Board only for a determination of whether the agency acted arbitrarily and capriciously in *denying* restoration; she has no right, except under very limited circumstances, to appeal an alleged improper restoration." *Id.* (original emphasis). For the reasons discussed below, we clarify these statements and find that the Board's jurisdiction over this appeal, and over the related issue of discrimination, does not depend on the AJ's findings on remand regarding the scope of the local commuting area.

¶14 "An individual who is partially recovered from a compensable injury may appeal to MSPB [the Merit Systems Protection Board] for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration. …" 5 C.F.R. § 353.304(c). The Board's jurisdiction is determined by the nature of the agency's action at the time an appeal is filed. *See Himmel v. Department of Justice*, 6 M.S.P.R. 484, 486 (1981). It is undisputed that the appellant was partially recovered from a compensable injury and that her request for restoration was denied by the agency. Therefore, the Board has jurisdiction over this appeal to review whether the agency acted arbitrarily or capriciously in denying restoration, and this jurisdiction is not divested by any future findings by the AJ on the scope of the local commuting area.

¶15 As noted in our earlier remand order, an agency's obligation to accommodate a disabled employee by reassignment is limited to searching for vacant positions

that are located within the local commuting area and are serviced by the same appointing authority. *See Sapp*, 73 M.S.P.R. at 194-95; *cf. id.* (the agency's obligation to restore a partially recovered employee includes searching for vacant positions throughout the local commuting area, regardless of whether serviced by the same appointing authority). Thus, on remand, the AJ shall determine, if necessary, which components of the agency within the local commuting area are serviced by the same appointing authority. Based on such a determination, the AJ shall readjudicate the disability discrimination claim.

Mr. Wright's Claims

¶16 Before the AJ, Mr. Wright requested three hours of official time for testifying as a witness at the hearing, and stated that this time included "waiting time, witness preparation time, testimony time, mileage, and 'return to worksite' travel time on the date of the hearing." RRF, Tab 12. He also requested mileage in the amount of 90 miles for traveling to the hearing site, "perhaps minus the 16 miles [he] normally travel[s] one way to work from home." In addition, he requested "2 hours for MSPB representation time in preparing the [appellant's prior] PFR [petition for review] as the new representative (including review and legal research, postage, page photocopy, etc.) …" *Id.* Based on this request, the AJ found that Mr. Wright was entitled to three hours of official time and reimbursement for 74 miles, as claimed, but was not entitled to any fees or expenses for acting as the appellant's union representative. RID at 7.

¶17 On petition for review, Mr. Wright contends that he is entitled to "official time for the 2 hours of preparing the PFR as the Appellant's then representative (which also was not done on either the Union payroll or on [agency] time)."[3] Mr.

[3] Mr. Wright also raises arguments in opposition to the agency "untimely submitted 10-31-97-dated 'Response to Affidavit for Third Party Compensation Claim'." PRF, Tab 3. We have not addressed such arguments because the record does not include any such filing by

Wright, in effect, is seeking reimbursement for services rendered during non-duty hours. Federal employee witnesses are in official duty status when appearing at a hearing and are entitled to pay and benefits including travel and per diem, *Sapp*, 73 M.S.P.R. at 196.[4] There is no statutory or regulatory authority for the Board to provide reimbursement for any time Mr. Wright spent on preparing the appellant's petition for review.[5] A non-attorney representative such as Mr. Wright is not entitled to be paid for the time he spent representing the appellant because there was no attorney-client relationship. 5 U.S.C. § 7701(g); 5 C.F.R. § 1201.202; *see Metsopulos v. U.S. Postal Service*, 35 M.S.P.R. 496, 498 (1987) (fees cannot be awarded to a representative who is not an attorney); *cf. Shimotsukasa v. U.S. Postal Service*, 78 M.S.P.R. 679, 682 (1998) (where an attorney-client relationship exists, fees for services rendered by certain non-attorneys under the attorney's direction may be recoverable). We therefore find that the AJ did not err in denying the appellant official time for the time he spent representing the appellant.

¶18 Regarding Mr. Wright's contention on review that the AJ "did not order 3 hours (or any appropriate portion thereof) be paid at the overtime rate," RPRF,

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the agency, and indeed the AJ noted in his initial decision that the agency did not respond to Mr. Wright's "Affidavit for Third Party Compensation Claim." RID at 7.

[4] 5 C.F.R. § 1201.33 provides that employees who furnish sworn statements or appear as witnesses in Board hearings are entitled to be in official duty status for those times, and to receive pay and benefits including travel and per diem, where appropriate. No comparable regulation exists with regard to an employee's use of official time for otherwise pursuing an appeal. *See White v. Social Security Administration*, 76 M.S.P.R. 447, 467, n.12 (1997).

[5] We note that the grant of official time for an employee to represent another employee in an MSPB proceeding is negotiable. *American Federation of Government Employees National Immigration and Naturalization Council v. Department of Justice Immigration & Naturalization Service Washington*, 45 F.L.R.A. 391, 399-401 (1992). Mr. Wright does not contend that any agreement or practice related to this issue exists.

Tab 3, we note that Mr. Wright did not specifically explain below why he was entitled to the overtime rate for any part of the three hours in question. RRF, Tab 12. He did note vaguely that "[a]nytime prior to my normal starting time of 10:30 AM would, of course, be at the overtime rate," but he did not specify when he appeared at the hearing site or otherwise specify how many hours, if any, he was entitled to the overtime rate. Nevertheless, we find it appropriate to clarify the remand initial decision to find that Mr. Wright should be afforded the overtime rate for any part of the three hours for which the overtime rate is applicable. *See Sapp*, 73 M.S.P.R. at 196 (compensation for time spent on a hearing is paid at an overtime rate if the witness appeared at the hearing during non-duty hours); *In re Douglas*, 32 M.S.P.R. 389, 391 (1987) (same); *In re Maisto*, 28 M.S.P.R. 436, 441 (1985) (same).

ORDER

¶19 Accordingly, the appeal is remanded to the regional office for further development of the record and a readjudication of the issues as discussed above.

¶20 If the AJ finds on remand that the local commuting area is limited to the Santa Ana District, he shall issue an initial decision so finding and incorporating the remaining findings in the original initial decision on the issues of restoration and discrimination.

¶21 If the AJ finds on remand that the local commuting area extends beyond the Santa Ana District, he shall issue an initial decision that includes specific findings on which components of the agency are located within the local commuting area. The initial decision shall reverse the agency's denial of restoration and shall order the agency to conduct an appropriate search within the local commuting area retroactive to September 21, 1994, the date of the appellant's request for restoration, and to consider her for any suitable vacancies. The initial decision shall also include specific findings, if necessary, on which components of the agency within the local commuting area are serviced by the same appointing

authority. Based on such findings, the AJ shall adjudicate the appellant's disability discrimination claim. In doing so, the initial decision shall incorporate, as appropriate, the findings in the original initial decision that are unaffected by his determination of which components of the agency within the local commuting area are serviced by the same appointing authority, e.g., the findings in the original initial decision that the positions of Mail Processor, Custodian, and Computer Forwarding Systems Clerk were unsuitable for the appellant.

FOR THE BOARD: _____

Robert E. Taylor
Clerk of the Board

Washington, D.C.